

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 HEATH VINCENT FULKERSON,

4 Plaintiff

5 v.

6 STATE OF NEVADA OFFICE OF THE
7 ATTORNEY GENERAL,

8 Defendants

Case No.: 3:20-cv-00419-RCJ-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1

9
10 This Report and Recommendation is made to the Honorable Robert C. Jones, United
11 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
12 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

13 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro
14 se complaint (ECF No. 1-1).

15 **I. IFP APPLICATION**

16 A person may be granted permission to proceed IFP if the person “submits an affidavit
17 that includes a statement of all assets such [person] possesses [and] that the person is unable to
18 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
19 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez*
20 *v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to
21 all actions filed IFP, not just prisoner actions).

22 The Local Rules of Practice for the District of Nevada provide: “Any person who is
23 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].

1 The application must be made on the form provided by the court and must include a financial
2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a
14 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
17 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the
18 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
19 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to
20 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
21 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under
22 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
23 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff's complaint names the State of Nevada Office of the Attorney General. Plaintiff
19 alleges that he was served with a felony complaint on or around July 2, 2020, which he claims
20 contains frivolous and false charges of theft and insurance fraud. He further avers that the service
21 of the complaint was by an Officer of the Reno Sparks Indian Colony Police Department, and
22 was therefore illegal. Plaintiff attaches a copy of the criminal complaint, which charges Plaintiff
23 with insurance fraud and theft.

1 Preliminarily, the State of Nevada and a governmental agency that is an arm of the state,
2 such as the Attorney General's Office, is not a person for purposes of section 1983. *See*
3 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Howlett v. Rose*, 496 U.S. 356,
4 365 (1990); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Doe v. Lawrence*
5 *Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997).

6 Moreover, it appears that Plaintiff is attempting to assert a malicious prosecution claim
7 insofar as he asserts that the Attorney General's Office has brought false charges against him.
8 The Supreme Court has declined to decide whether a malicious prosecution claim is cognizable
9 under section 1983. *McDonough v. Smith*, 139 S.Ct. 2149, 2156 n. 3 (2019) ("this case provides
10 no occasion to opine on what the elements of a constitutional malicious prosecution action under
11 § 1983 are or how they may differ from those of a fabricated-evidence claim"); *Manuel v. City of*
12 *Joliet, III*, 137 S.Ct. 911, 921-22 (2017); *Wallace v. Kato*, 549 U.S. 384, 390 n. 2 (2007) ("We
13 have never explored the contours of a Fourth Amendment malicious prosecution suit under §
14 1983, *see Albright v. Oliver*, 510 U.S. 266, 270-71 (1994) (plurality), and we do not do so
15 here.").

16 The Ninth Circuit has not expressly weighed in on the issue, but implicitly recognized
17 such a claim in *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068-69 (9th Cir. 2004) (citations
18 omitted). There, the court stated that to prevail on this claim, the plaintiff "must show that the
19 defendants prosecuted [him] with malice and without probable cause, and that they did so for the
20 purpose of denying [him] equal protection of another specific constitutional right." *Id.* Most
21 federal appellate courts have also recognized a malicious prosecution claim under section 1983.
22 *See, e.g., Pitt v. District of Columbia*, 491 F.3d 494 (D.C. Cir. 2007); *Britton v. Maloney*, 196
23 F.3d 24, 30 (1st Cir. 1999); *Swartz v. Insogna*, 704 F.3d 105 (2d Cir. 2013); *Johnson v. Knorr*,

1 477 F.3d 75 (3d Cir. 2007); *Evans v. Chalmers*, 703 F.3d 636, 646 n. 2 (4th Cir. 2012), *cert*
2 *denied*, 134 S.Ct. 98 (Oct. 7, 2013) and 134 S.Ct. 617 (Nov. 12, 2013); *Sykes v. Andeson*, 625
3 F.3d 294, 308-09 (6th Cir. 2010); *Novitsky v. Aurora*, 491 F.3d 1244 (10th Cir. 2007); *Wood v.*
4 *Kesler*, 323 F.3d 872, 881 (11th Cir. 2003).

5 The Supreme Court noted the common law elements of the tort of malicious prosecution:
6 "a defendant instigated a criminal proceeding with improper purpose and without probable
7 cause" and the proceedings have terminated in favor of the accused. *See McDonough v. Smith*,
8 139 S.Ct. 2149, 2156 (2019) (citing Restatement (Second) of Torts § 653). Assuming that such a
9 claim is cognizable, the Supreme Court held that it accrues only once the underlying criminal
10 proceedings have resolved in the malicious prosecution plaintiff's (i.e., criminal defendant's)
11 favor. *McDonough v. Smith*, 139 S.Ct. 2149, 2156 (2019) (citing *Heck v. Humphrey*, 512 U.S.
12 477, 483 (1994)).

13 Here, Plaintiff does not allege that the criminal proceeding has terminated in his favor.
14 Therefore, even if he sued a proper defendant, such a claim has not yet accrued.

15 It is also appropriate for the court to abstain from this civil case where there is an ongoing
16 state court criminal proceeding. *See Younger v. Harris*, 401 U.S. 37 (1971).

17 Finally, to the extent Plaintiff argues that service of the criminal complaint was not
18 proper, that is something he should raise directly in the criminal case.

19 For these reasons, it is recommended that this action should be dismissed. The dismissal
20 should be without prejudice in the event Plaintiff can allege that the underlying criminal
21 proceeding has terminated in his favor and can sue a proper defendant; however, this action
22 should be administratively closed.
23

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain this action without prepaying the filing fee or giving security therefor. This order granting IFP status does not extend to the issuance of subpoenas at government expense.

(2) The complaint (ECF No. 1-1) should be **FILED**.


(3) The action should be **DISMISSED WITHOUT PREJUDICE**, and the action should administratively closed.

The Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of being served with a copy of the Report and Recommendation. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

Dated: August 18, 2020



William G. Cobb
United States Magistrate Judge